Supreme Court, U.S.
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No. 98-1076

In The

Supreme Court of the United States

October Term, 1998

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA,
dba UNOCAL, NATIONAL AUTO/TRUCKSTOPS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2(e) of the Robinson-Patman Act makes it unlawful for the seller of a commodity for resale to discriminate in favor of one purchaser against another purchaser by furnishing "facilities connected with" the resale on disproportional terms. The question presented is whether realty leased to a purchaser of a commodity for resale, by the party that sells the commodity to that purchaser, is "facilities connected with" the resale in the sense of the Robinson-Patman Act.

LIST OF PARTIES AND AFFILIATES

Petitioner's list of parties and affiliates is accurate. Pursuant to Supreme Court Rule 29.6, Union Oil Company of California declares that it is a wholly owned subsidiary of Unocal Corporation, whose stock is publicly traded on the New York Stock Exchange. Union Oil Company of California has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e), makes it unlawful for a seller of a commodity for resale to discriminate in favor of one purchaser against another purchaser ~~by~~ furnishing "facilities connected with" the resale on disproportional terms. Petitioner ("Portland 76") sued respondent ("Unocal") in the District of Oregon, alleging that it lost profits as a result of Unocal's violation of section 2(e). The petition, however, describes neither the case tried in the district court nor the one decided in the court of appeals.

Unocal, which sold diesel fuel to truckstop operators for resale, owned the truckstops and leased them to franchisees, including Portland 76, throughout the West and elsewhere. But Portland 76 did not allege that it lost profits because Unocal provided facilities *at* the truckstops on disproportional terms, as the petition continually implies. *See, e.g.*, Pet. 3, 6, 9, 16-17. To the contrary, Portland 76 alleged that Unocal leased *the* truckstops, *entire* truckstops, to Portland 76 and three other Unocal franchisees on disproportional terms.

Portland 76 operated the Unocal truckstop in Aurora, Oregon, and it alleged that Unocal "fail[ed] to carry out renovations for [Portland 76], while providing them for [Portland 76's] competitors" in Redding, Sacramento, and Santa Nella, California. Beginning with its first complaint and continuing through six amendments, Portland 76 anchored its case on the allegation that Unocal violated section 2(e) because it "failed and refused to renovate and upgrade [Portland 76's] facility," not that Unocal failed to

provide facilities *at* the truckstop on proportional terms, which is the petition's theme. *See, e.g.*, Pet. 6, 7, 10-11.

The magistrate judge did not, as the petition asserts, consider whether facilities at the truckstop could be "facilities" under section 2(e). Pet. 6. That was never an issue. At trial, Portland 76 undertook to prove that Unocal spent more, dollar for dollar, on renovation and improvements at the truckstops in California than at the one in Aurora, and argued that it was entitled to the same. This prompted the magistrate judge to remark that "it does not make sense for someone who rents a Chevrolet to demand a Cadillac," App. 7, but when Unocal moved for judgment as a matter of law, Fed. R. Civ. Pro. 50(a), (b), he stuck to his pretrial ruling that the "truck stop at issue here" – not the facilities *at* the truckstop – appears to be "a 'facility' as that term is generally understood."

Following the denial of Unocal's motion for judgment as a matter of law, the jury returned their substantial verdict and Unocal took its appeal to the Ninth Circuit Court of Appeals. Contrary to the petition's report, Pet. 7, the court of appeals, like the trial court, did not consider whether facilities at the truckstop were "facilities" under the Robinson-Patman Act. Again, that was not an issue. The issue, as framed by the court, App. 5, was "whether the Robinson-Patman Price Discrimination Act applies to the truck stop as a 'facility,' " the same as it had been in the district court. The court of appeals pointed out, correctly, that Portland 76 "won its verdict on the theory that it does . . . . " *Id.*

The Ninth Circuit reversed. The court observed that the word "facilities," read literally and in isolation, could describe a truckstop, "as Portland 76 successfully claimed in district court." App. 6. But "because the language is extremely general and subject to different constructions," *id.*, the court looked to Robinson-Patman's legislative history, App. 10-12, and to the Act's "long established administrative interpretation by the Federal Trade Commission," App. 13-15, for evidence of Congressional intent. The court also looked for guidance to the decisions of this Court and others in deciding whether the lease of a truckstop by the seller of diesel fuel is a "facility" within the meaning of section 2(e), App. 8-10, concluding that it is not. "[R]ealty leased to a purchaser of goods for resale," the court wrote, "by the party that sells the goods to that purchaser, is not 'facilities connected with' the sale in the sense of the Robinson-Patman Act." App. 17.

Portland 76 petitions this Court for a writ of certiorari, which should be denied.

REASONS FOR DENYING THE WRIT

The petition, every component of it, is built on a case not tried in the district court, not decided in the court of appeals. As a consequence, the petition's "Questions Presented" are not, and the significance of the case described in the petition is not the case before the Court today. Contrary to the petition's assertions, there is no conflict between the opinion in this case and any other. Nothing in the petition discloses a compelling reason to grant it.

A. The Case Described In The Petition Is Not The Case Before The Court Today.

The petition describes the circuit court's holding as follows:

- "The Ninth Circuit Court of Appeals . . . concluded that the Robinson-Patman Act's ban on the discriminatory provision of 'facilities' did not apply to 'facilities' provided on leased property . . . . " Pet. 3.

- "The Ninth Circuit [held] that the truckstop facilities were not 'facilities' under the Robinson-Patman Act." Pet. 6.

- The "Ninth Circuit believed that 'facilities' at the truckstop were not 'facilities' under the Robinson-Patman Act." Pet. 7.

- The "Ninth Circuit . . . concluded that 'facilities' on leased property were not 'facilities' under the statute." Pet. 9.

From these descriptions of the holding, the petition argues that the opinion "creates a judicially made exception to the statute," Pet. 7 – the "leased property exception," Pet. 11 – and that the court's decision will enable franchisors to "evade the Robinson-Patman Act simply by linking the provision of facilities to a lease agreement." Pet. 7, 25. According to the petition, Pet. 17, handbills, cabinets, and displays – items that everyone agrees may be "facilities" – are not, if they are provided by a franchisor that leases the property on which the franchisee is located. According to the petition, Pet. 26, the circuit court's opinion gives franchisors a free pass.

Whatever the effects of the purported holding described in the petition, they are not the effects of the holding in the circuit court. The holding described in the petition is not the holding in *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Company of California*. The circuit court in *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Company of California* did not hold that "facilities" on leased premises are not "facilities" within the meaning of section 2(e). The circuit court held that "realty leased to a purchaser of goods for resale, by the party that sells the goods to that purchaser, is not 'facilities connected with' the sale in the sense of the Robinson-Patman Act." App. 17.

The difference is significant. The opinion addresses whether leased real estate can be a section 2(e) "facility." The petition addresses whether "facilities" on leased premises can qualify. Under the opinion, there is no "leased property exception" of the sort that informs the petition. Under the opinion, and contrary to the petition, franchisors are not exempt from section 2(e). Under the opinion, handbills, cabinets, and displays located on leased property can still qualify as "facilities" under section 2(e), the same as they could be before.

B. The Ninth Circuit's Opinion Does Not Depart From Established Jurisprudence Nor Does It Conflict With The Law Of Any Other Circuit.

The petition argues that the opinion "has no basis in this Court's jurisprudence or the legislative history," Pet. 7, and accuses the circuit court of abdicating its responsibility to the law and following poorly reasoned decisions from the Fourth and Sixth Circuits, ostensibly to

avoid intercircuit conflict. Pet. 12-15. According to the petition, Pet. 19-25, the result is an opinion that conflicts with this Court's decisions, with those of other circuits, and with an earlier Robinson-Patman case from the Ninth Circuit as well. These charges, like the others, are infected by the petition's refusal to acknowledge the case that was tried and appealed. None withstands scrutiny. All are wrong.

1. The Circuit Court's Opinion Is Faithful To The Law. It Requires No Defense.

Section 2 of the Clayton Act made it unlawful for suppliers of goods to engage in direct price discrimination. 38 Stat. 730 (1914). To get around this prohibition, "large chain buyers" exerted "their enormous purchasing power" to exact price concessions disguised as advertising allowances or "special services or facilities" or rebates for "brokerage fees." *F. T. C. v. Simplicity Pattern Co.*, 360 U.S. 55, 60 (1959). As the circuit court pointed out, App. 12, section 2(e) attacked these secret discriminations disguised as advertising and promotional discounts to the chainstores. *Simplicity Pattern*, 360 U.S. at 69 n. 12. Section 2(e) made it unlawful for sellers of commodities to discriminate in furnishing "services or facilities connected with" their resale.

"[P]recision of expression is not an outstanding attribute of the Robinson-Patman Act," however, *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65 (1952), and section 2(e), like so much of Robinson-Patman, is exquisitely ambiguous. The petition argues that it is not, Pet. 7-10, but the circuit court's opinion demonstrates

convincingly that it is, App. 5-10, and there is no need to demonstrate the point again here.

Once one recognizes that section 2(e) is open to interpretation, the circuit court's analysis, far from having "no basis in this Court's jurisprudence or the legislative history of the statute," Pet. 7, is firmly grounded in both. Had the court held that "facilities on *leased* property somehow are excluded from the ambit of section 2(e)," as the petition asserts, Pet. 12, a defense of the opinion might be required. But the court held that "realty leased to a purchaser of goods for resale, by the party that sells the goods to that purchaser, is not 'facilities connected with' the sale in the sense of the Robinson-Patman Act," App. 17, an entirely different matter – and nothing further need be said.

It is unfair, nonetheless, to argue, as the petition does, Pet. 14, that the court abdicated its responsibility to the law to "follow two opinions that it explicitly recognized as being devoid of compelling reasoning in order to *avoid* a conflict between the circuits." It is unfair to argue, as the petition does, *id.*, that the opinion thus "avoids a reasoned consideration of the issue presented in the case." That plainly is not so.

The court in *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 380 (4th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992), held that "real estate leases . . . are not within the scope of Robinson-Patman Act section 2(e)." The court in *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971), held that the "Act is not concerned with what we have here[,] a lease of realty." The results there mirror the result here,

but the Ninth Circuit did not blindly "follow those opinions." Pet. 14. One need only read the opinion in this case to know that this is so. The circuit court merely took note of the decisions from its sister circuits and commented that it "shall not lightly create an intercircuit conflict affecting commerce nationally," App. 10 – which it did not.

2. The Circuit Court's Opinion Does Not Conflict With Any Other.

Certainly the circuit court's opinion does not conflict with its own earlier opinion in *Standard Oil Co. of Cal. v. Perkins*, 396 F.2d 809 (9th Cir. 1968), *rev'd*, 395 U.S. 642 (1969). Certainly it does not conflict with the Second Circuit's opinion in *Haug v. Rolls Royce Motor Cars*, 148 F.3d 136 (2d Cir. 1998).

More than 75 years ago, in *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923), this Court wrote that the writ of certiorari is reserved for "real and embarrassing conflict of opinion and authority between the circuit courts of appeals." The supposed conflict between the opinions in this case and *Haug* is neither real nor embarrassing. It does not exist.

Haug was an authorized Rolls Royce parts and service provider. It alleged that Rolls discriminated in favor of its competitor, Carriage House, which was both an authorized Rolls parts and service provider and an authorized Rolls dealer as well. The district court dismissed

Haug's section 2(d)[1] and 2(e) complaint against Rolls "on the grounds that Haug is not 'functionally equivalent' to Carriage House," as required. *Haug*, 148 F.3d at 145. That was the issue on appeal – whether Haug and Carriage House were "functionally equivalent" – and the Second Circuit reversed. In *dictum*, however, the court observed:

> Haug's amended complaint alleged that Rolls Royce "[p]aid or caused to be paid through affiliates of [Rolls Royce] the rent for Carriage House of approximately . . . $60,000 to $90,000 per month, but did not pay such costs to plaintiffs[.]" . . . These payments are best construed as allegations of Section 2(d).

Id. That *dictum*, which the petition fastens onto, hardly presents a "real and embarrassing conflict of opinion and authority between the circuit courts of appeals." *Layne & Bowler Corp.*, 261 U.S. at 393.

In any case, *Haug*'s musings about section 2(d) of the Act have no bearing here. Under 2(d), it is unlawful for

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[1] Section 2(d) provides:

> (d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. 15 U.S.C. § 13(d)

the seller of a commodity to make discriminatory payments in exchange for "facilities" furnished *by* the purchaser. Thus, *Haug* could not have held that realty leased to the purchaser constitutes "facilities" under Robinson-Patman. For that reason, too, *Haug* presents no conflict.

Neither does the Ninth Circuit's earlier opinion in *Perkins*. The court there held that, to the extent Perkins was a station operator rather than a wholesaler, "Standard was obliged," under sections 2(d) and (e), "to make the same proportional payments and allowances to Perkins for such items as service station rest room maintenance, painting of service stations, advertising and credit card privileges, as it did to the Branded Dealers." 396 F.2d at 814. The *Perkins* court did not consider whether an entire service station was a Robinson-Patman "facility" and, as the circuit court concluded here, any suggestion that painting of service stations and restroom maintenance constitute "services or facilities" was plainly *dicta*, App. 9, which is not the stuff of a writ of certiorari.

3. The Circuit Court's Opinion Correctly Applied Established Principles Of Statutory Construction.

The petition is not credible in its assertion that the circuit court's opinion "conflict[s] in principle with this Court's instructions regarding interpretation of terms contained in the Robinson-Patman Act." Pet. 21. It is not credible in its assertion that the Ninth Circuit's "approach in this case in narrowly interpreting the word 'facilities' also is contrary to the approach taken by its sister circuits in interpreting and applying that same word." Pet. 22.

The Ninth Circuit declined Portland 76's invitation to construe the statutory phrase expansively in this case:

> In sum, we have a word, "facilities," in the statute, that might be read to include leased realty or not. The dictionary definitions suggest inclusion, but the historical context, constructions by other circuits, and the administrative construction, all indicate that something narrower is intended.

App. 15. In doing so, however, the court did not ignore this Court's "instructions" that "the undefined terms in the Act need to be interpreted broadly." Pet. 21. To the contrary, the court applied well-established principles of statutory construction to ascertain and give effect to Congressional intent. *See Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 170 (1983) (" 'Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress' ").

Here, as in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 (1974), where this Court construed the "in commerce" requirement of the Act, the "question . . . is how far Congress intended to extend its mandate under the . . . Robinson-Patman Act[ ]." Here, as there, the "answer depends on the statutory language, read in light of its purposes and legislative history[,]" *id.*, not on adjectives like "narrow" and "broad." The goal here was not to construe language narrowly, as the petition implies. The goal here, as in all Robinson-Patman cases, was to construe the Act in a way that "most nearly accommodates" the reasoning of judges and legislators. *Automatic Canteen*

Co., 346 U.S. at 78-79 (declining to give literal reading to language in the Act).

"Broad" is not Robinson-Patman litmus. To the contrary, this Court has twice "warned against interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act,' " *Great Atlantic & Pacific Tea Co. v. F.T.C.*, 440 U.S. 69, 80 (1979); *Automatic Canteen Co.*, 346 U.S. at 63, and the Ninth Circuit took heed of that warning here. In doing so, the court did not adopt an analysis "contrary to the approach taken by its sister circuits," Pet. 22, because no circuit has given the statute the "broad" construction claimed. Every circuit has construed section 2(e) as the Ninth Circuit did here, to effectuate Congressional intent. *See, e.g., L&L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1118 (5th Cir. 1982) ("delivery is not a service or facility within § 2(e)"); *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1328 (6th Cir. 1983) (credit programs and freight allowances fall outside of section 2(d) and (e)); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1424 (11th Cir. 1990) ("financing programs do not relate to the resale of the supplier's goods and therefore are not services and facilities within the meaning of sections 2(d) and (e)").

The circuit court's opinion does not conflict in principle, or in any other respect, with this Court's instructions concerning statutory construction. It follows them. The circuit court's approach to statutory construction is consistent with, not contrary to, the approach taken by its sister circuits. There is no conflict here.

CONCLUSION

The petition discloses no compelling reason to grant it. It should therefore be denied.

Respectfully submitted,

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